Supreme Court, U.S.
FILED
OCT 30 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-870

In The

Supreme Court of the United States

October Term, 1987

PHILLIPS PETROLEUM COMPANY and
CINQUE BAMBINI PARTNERSHIP,
Petitioners,

v.

STATE OF MISSISSIPPI and
SAGA PETROLEUM, U.S., INC.,
Respondents.

On Writ of Certiorari to the Supreme Court of Mississippi

PETITIONERS' REPLY BRIEF

EUGENE GRESSMAN
1111 Raymond Boulevard
Newark, N.J. 07102
(201) 642-8844
Counsel of Record

JOEL BLASS
Mize, Thompson & Blass
Gulf National Bank Bldg.
Gulfport, Miss. 39502
(601) 863-2612

WILLIAM G. PAUL
General Counsel
JOHN L. WILLIFORD
ELIZABETH A. HARRIS
Legal Division, Phillips
Petroleum Company
1252 Adams Building
Bartlesville, Okla. 74004
(918) 661-6280

Counsel for Petitioners

October 1987

CASELLAS PRESS INC. — 1717 K ST NW WASHINGTON DC 20036 — 223-1220

REPLY BRIEF INDEX

Page

ARGUMENT

I. The lands in question lie beneath non-navigable drainage streams that lack any public use or interest 2

II. Mere presence of a tidal influence on a discrete non-navigable stream does not establish public trust ownership 6

III. Lands beneath discrete non-navigable drainage streams are not "tidelands" for public trust purposes 13

CONCLUSION 20

APPENDIX 1a

TABLE OF AUTHORITIES

Cases: Page

Baer v. Moran Brothers Co.,
153 U.S. 287 (1894) 15, 16

Barney v. Keokuk,
94 U.S. 324 (1876) 12

Block v. North Dakota,
461 U.S. 273 (1983) 7

Brewer-Elliott Oil & Gas Co. v. United States,
160 U.S. 77 (1922) 19

Egan v. Hart,
165 U.S. 188 (1897) 3

Hardin v. Jordan,
140 U.S. 371 (1891) 14

Illinois Central Railroad v. Illinois.
146 U.S. 387 (1892) 10, 13, 18

Kaiser Aetna v. United States,
444 U.S. 164 (1979) 16

Knight v. U.S. Land Association,
142 U.S. 161 (1891) 15, 18

McGilvra v. Ross,
215 U.S. 70 (1909) 11, 12

Mann v. Tacoma Land Co.,
153 U.S. 273 (1894) 15, 16

Marshall Dental Mfg. v. Iowa,
226 U.S. 460 (1913) 3

Massachusetts v. New York,
271 U.S. 65 (1926) 15

Page

Mayor of Lynn v. Turner,
1 Cowd. 86, 98 Eng.Rep. 980 (K.B. 1774) 8

Montana v. United States,
450 U.S. 544 (1981) 7

Montello, The,
87 U.S. (20 Wall.) 430 (1874) 7

Packer v. Bird,
137 U.S. 661 (1891) 6, 12, 18

Pollard's Lessee v. Hagan,
44 U.S. (3 How.) 212 (1845) 14

Propeller Genesee Chief v. Fitzhugh,
53 U.S. (12 How.) 443 (1851) 10, 14

Royal Fisheries of the Banne,
Davies Rep. 149 (circa 1604) 7

Shively v. Bowlby,
152 U.S. 1 (1894) 9, 10, 11, 14, 15

Toledo Liberal Shooting Co. v. Erie Shooting Club,
96 Fed. 680 (C.C.A. 6, 1898) 17

United States v. Holt State Bank,
270 U.S. 49 (1926) 19

United States v. Oregon,
295 U.S. 1 (1935) 18

United States v. Turner,
175 F.2d 644 (5th Cir. 1949, *cert. denied,* 338 U.S. 851 (1949) 18

United States v. Utah,
283 U.S. 64 (1931) 19

Page

Utah Division of State Lands v. United States,
107 S.Ct. 2318, 96 L.Ed.2d 162 (No. 85-1772,
June 8, 1977) 7, 9

Weber v. Board of State Harbor Commissioners,
85 U.S. (18 Wall.) 57 (1873) 15

Wisconsin v. Trudeau,
139 Wis.2nd 91 (1987), presently pending on
petition for certiorari 19

Statutes:

Act of March 1, 1817, 3 Stat. 349 10

Northwest Ordinance, 1 Stat. 50 10

Miscellaneous:

Atlas of Mississippi (Univ. Press of Miss., 1974) 3

Black's Law Dictionary (4th ed. 1951; 5th ed. 1979) 4, 5

Lord Hale, De Jure Maris 9

A.L. Shalowitz, Shore and Sea Boundaries, Vol. 1 (1962) 16

L.A. Teclaff, Water Law in Historical Perspective (1985) 16

Webster's Third International Dictionary (1981) 5

In The

Supreme Court of the United States

October Term, 1987

No. 86-870

PHILLIPS PETROLEUM COMPANY and
CINQUE BAMBINI PARTNERSHIP,
Petitioners,

v.

STATE OF MISSISSIPPI and
SAGA PETROLEUM, U.S., INC.,
Respondents.

On Writ of Certiorari to the Supreme Court of Mississippi

PETITIONERS' REPLY BRIEF

The briefs of the two respondents and their supporting *amici*[1] err in two critical respects:

(1) They mistakenly assume that the mere presence of a tidal influence suffices to establish public trust ownership of lands beneath non-navigable and otherwise non-usable discrete little drainage streams.

---

[1] In this reply brief, "R" refers to the certified record of the trial proceedings; "J.A.' refers to the joint appendix; "Miss.Br." refers to the merits brief of the respondent State of Mississippi; "Saga Br." refers to the merits brief of the respondent Saga Petroleum; "13 Br." refers to the *amici* brief of the thirteen original States; and "Cal.Br." refers to the *amici* brief filed by the State of California and ten other States.

(2) They erroneously assume that lands beneath discrete non-navigable drainage streams, which have no public purpose or usage and which lack relationship with a navigable stream, are "tidelands" within the meaning of the equal footing and public trust doctrines.

This reply brief addresses these two major errors. We begin, however, by further clarifying the physical characteristics of the underwater lands in issue. Many of the legal misconceptions that cloud the four opposing briefs stem from failure to examine or appreciate the true nature of these little drainage streams and bayous. Only the brief of the State of Mississippi makes any attempt to describe these waters, but that effort is flawed. Miss.Br. 6-10.

I

The lands in question lie beneath non-navigable drainage streams that lack any public use or interest.

The Mississippi Supreme Court premises its ruling on the conceded fact that the "forty-two plus acres" (Pet. App. 2a) of land still in issue lie beneath waters that are both (1) non-navigable in fact and (2) subject to the daily ebb and flow of tides. Such dual characteristics are particularly evident in the "eleven small drainage streams ranging in size from .44 acres to 9.966 acres" (Pet.App. 2a), streams that lie entirely within the interior of the privately owned uplands.

But acreage computation does not adequately describe these streams. They are of varying lengths, most of them very short and none more than a mile long. They are narrow, sharply winding, and shallow, varying in depth from 2 to 6 feet. R. 228. Mississippi's brief states that none of the streams bears any name. Miss. Br. 7. Some are vir-

tually unnoticeable when passing by their mouths, which can be obscured by the tall marsh grass that grows to the waters' edge. R. 226. Certainly, as is conceded, none of the streams is navigable or usable in the commercial sense. Only the smallest of boats can navigate the shallow streams for short distances; but the underwater debris often makes such journeys hazardous. R. 111, 226, 228.

The merits brief of the State of Mississippi asserts, for the first time in this proceeding, that "[i]n no sense of the word could they [the eleven streams] be described as 'drainage ditches.' " Miss.Br. 10. Any assertion that these streams are not "drainage" in character is impermissible and inaccurate. It is impermissible because it contradicts not only the facts of record (R. 223, 232) but the concurrent fact findings of the two courts below. The Chancery Court found these to be "interior drainage streams" (Pet.App. 41a), while the Mississippi Supreme Court described them as "eleven small drainage streams" (Pet.App. 2a). Such a factual determination cannot be questioned or relitigated before this Court. See *Egan* v. *Hart,* 165 U.S. 188, 189, 191 (1897); *Marshall Dental Mfg. Co.* v. *Iowa,* 226 U.S. 460, 461 (1913).

The unsupported assertion that these are not drainage streams or ditches is also factually inaccurate. The lower courts' "drainage" characterization reflects the physical fact that the streams are draining rain water and fresh water from the uplands. The flat elevation of this area makes for a slow moving drainage and a degree of brackishness from the backwash of the tides. But "drainage" is the only adjective to apply to these little streams. Indeed, in a geographical area where the annual rainfall is more than 60 inches,[2] the excess water falling on the adjoining

[2] The mean annual precipitation in the coastal region of Mississippi, where the lands in question are located, ranges from 60 to 65 inches, the average being 62 inches. Atlas of Mississippi 12 (Univ. Press of Miss., 1974).

soils naturally demands a run-off ditch or stream. That accounts for the development of these eleven little streams, a common phenomenon throughout nature.[3]

Nor can these drainage streams be deemed "arms of the sea," as Mississippi would have it. Miss.Br. 10. They are but little fresh water drainage tributaries slowly flowing into the navigable Jourdan River, which in turn flows into a true arm of the sea – Bay St. Louis. To treat the farthest inland reach of these tributaries, the point to which the Mississippi court's metaphorical toothpick under sail might reach (Pet.App. 12a), as the inner boundary or shore of the Gulf of Mexico, Bay St. Louis or the Jourdan River confounds geophysics and common sense. Particularly is that so when one realizes that the tidal influence observable in the drainage streams largely consists of fresh water that is backed up by the salt water tides of the Gulf.[4]

Mississippi also seeks, for the first time in these proceedings, to redefine and remake these little drainage streams into "tidewaters" and the soil beneath them into "tidelands." Miss.Br. 9-10. This effort is premised not on any facts of record or any determination by the lower courts, but upon dictionary definitions.[5] While the

---

[3] Mississippi makes the amazing and undocumented statement that these waters "are all below sea level." Miss.Br. 10. If that were true, all these eleven drainage streams would be flowing backwards.

[4] The tidal influence in these eleven streams is created not only by the backwash of the salt water tides of the Gulf coast but by the prevailing winds and the amount of rain water draining off the lands at any given period. See R. 270, 289, 290.

[5] Mississippi relies solely on the definitions of "tidewater" and "tideland" in Black's Law Dictonary. Miss.Br. 6, n. 1; 34, n. 14. The terms are there defined generally as water that falls or rises with the ebb and flow of the tide, and as land that is covered and uncovered by the ebb and flow. But Mississippi chooses not to quote Black's further delineation of a "tideland" as constituting "that portion of the shore or beach covered and uncovered by the ebb and flow of ordinary tides."

Mississippi Supreme Court remarks early in its opinion that the underwater lands in issue "are arguably tidelands" (Pet.App. 1a), the court does not pursue that argument or premise its decision on any notion that these are true tidelands. Its ruling is that Mississippi holds fee simple title "to all lands naturally subject to tidal influence, inland to today's mean high water mark." Pet.App. 2a.

In any event, as will be demonstrated in Part III of this reply brief, neither the public trust nor the equal footing doctrine encompasses lands under discrete water bodies, not usable by the public in any manner that do not form part of the shore or coast of a navigable body of water, such as the Gulf. Mississippi's belated effort, by artful use of dictionary definitions, to transform "lands naturally subject to tidal influence" into "tidelands" beneath "tidewaters" is not acceptable. Tidal influence on a discrete non-navigable stream is simply not the equivalent of "tidewaters" or "tidelands" as those terms are used in public trust or equal footing jurisprudence.

Finally, it is significant that the State of Mississippi is unable to point to any facts of record showing that these little streams and bayous have any public or commercial use. It is conceded that they are non-navigable for any purpose. They are not public highways for commerce. They do not provide any public access to a navigable river or bay. They are simply not suited for public fishing, swimming or boating, and no such use has been made of them. Only on rare occasions has a solitary fisherman been observed. Pet.App. 41a; and see R. 113, 220, 225,

---

Black's Law Dictonary, p. 1652 (4th ed. 1951), a definition continued in the 5th edition (1979) at p. 1329.

See also Webster's definition of a "tide" as "the alternate rising and falling of the surface of the ocean and of gulfs, bays, estuaries, and other water bodies connected with the ocean that occurs twice a day . . . ." Webster's Third New International Dictionary, p. 2390 (1981).

229. These waters benefit only the private owner of the uplands, draining excess rain water from his land and on occasion permitting a drink for his grazing cattle.

The respondent Saga Petroleum candidly asserts that Mississippi's only interest in these particular underwater lands is to lease them for oil and gas exploration "for the purpose of obtaining revenue and thereby benefiting the state's citizens." Saga Br. 16. Such a profit motive is not a respectable reason for a State asserting or obtaining a fee simple title to real estate at the expense of its citizen landowners. See *Packer* v. *Bird*, 137 U.S. 661, 671 (1891).

Nor is there any evidence in this record that these little streams and bayous had any public usage whatever in 1817, when Mississippi was admitted to the Union. Then as now, these were naturally formed streams whose primary if not sole purpose or use was and is to drain excess rain water off the uplands. In that sense, and in any sense, these streams were and are nothing more than the interior drainage system of the uplands.

II

Mere presence of a tidal influence on a discrete non-navigable stream does not establish public trust ownership.

The respondents and their *amici* seek to make tidal ebb and flow the sole requirement of, and justification for, public trust ownership of land beneath discrete streams that are neither navigable nor otherwise susceptible to public enjoyment or usage. Such a position confounds all established precedents. And it ignores the public policies that underlie and justify the public trust doctrine.

It is long established that the sovereign has trust ownership of the lands under navigable waters, while private

riparian owners have title to the lands under non-navigable waters. See *The Royal Fisheries of the Banne*, Davies Rep. 149 (circa 1604) (the King owns navigable rivers only, leaving title "to every other river not navigable" to the adjoining land owners); *Montana* v. *United States*, 450 U.S. 544, 551 (1981) ("owners of land riparian to *non-navigable* streams may own the adjacent riverbed, [but] conveyance by the United States of land riparian to a *navigable* river carries no interest in the riverbed").

Just last Term, this Court summarized the history of the rule that only lands under navigable waters come within the equal footing doctrine, as well as the public trust doctrine. In *Utah Division of State Lands* v. *United States*, 107 S.Ct. 2318, 2320, 96 L.Ed.2d 162, 169 (No. 85-1772, June 8, 1987),[6] of the Court wrote:

> Under English common law the English Crown held sovereign title to all lands underlying navigable waters. Because title to such land was important to the sovereign's ability to control navigation, fishing and other commercial activity on rivers and lakes, ownership of this land was con-

---

[6] Justice White's dissenting opinion in the *Utah* case agrees that "A State obtains title to the land underlying a navigable water upon its admission to the Union . . ." 107 S.Ct. at 2327, 96 L.Ed.2d at 177. See also Justice White's opinion for the Court in *Block* v. *North Dakota*, 461 U.S. 273, 277 (1983).

Although the *Utah* decision was rendered a month before the four opposing merits briefs were filed, only Mississippi's brief cites or mentions the decision. While quoting some of the above language from the majority opinion, the Mississippi brief does not analyze, distinguish or recognize the significance of this Court's most recent articulation of the historic fact that only "land under navigable waters" was held in public trust by the English Crown, or by the thirteen colonies, or by the original thirteen States, or by any State subsequently admitted to the Union. Miss.Br. 19-20.

> sidered an essential attribute of sovereignty. Title to such land was therefore vested in the sovereign for the benefit of the whole people. See *Shively* v. *Bowlby*, 152 U.S. 1, 11-14 (1894). When the thirteen colonies became independent from Great Britain, they claimed title to the lands under navigable waters within their boundaries as the sovereign successors to the English Crown. *Id.*, at 15. Because all subsequently admitted States enter the Union on an "equal footing" with the original thirteen States, they too hold title to the land under navigable waters within their boundaries upon entry into the Union. *Pollard's Lessee* v. *Hagan*, 3 How. 212 (1845).

Thus emerges the decisive point in this case: When Mississippi entered the Union in 1817 it acquired sovereign trust title only to "land under navigable waters," thereby achieving equal footing with the original thirteen States. Obviously excluded from this public trust was land under non-navigable waters. And since it has been clear since at least 1774, when Lord Mansfield delivered his opinion in *Mayor of Lynn* v. *Turner*, 1 Cowp. 86, 98 Eng. Rep. 980, 981 (K.B. 1774), that the mere flowing and reflowing of the tide does not make a non-navigable river navigable, Mississippi could not have acquired public trust dominion in 1817 over the non-navigable little drainage streams and bayous at issue in this case.

The conclusion is confirmed by the public policy underlying the public trust doctrine, a policy that makes sense only as to navigable waters. As *Packer* v. *Bird*, 137 U.S. 661, 667 (1891), explained, it is "the susceptibility [of navigable waters] to use as highways of commerce which gives sanction to the public right of control over navigation upon them, and consequently to the exclusion of private ownership, either of the waters or the soils under them." In other words, sovereign ownership of lands un-

der navigable waters is essential to "the sovereign's ability to control navigation, fishing and other commercial activity" on those waters. *Utah Division of State Lands* v. *United States, supra.*

Since non-navigable waters, like the ones in question, are not susceptible to use as highways of commerce, there is no reason or policy that justifies impressing public trust ownership on them. And since there is no evidence that the streams were any more navigable in 1817, Mississippi's statehood year, non-navigability is enough to dispose of this case and to reverse the judgment below.

Indeed, public navigability and commerce have always been the hallmarks of this nation's public trust concerns, as well as those of the common law and of the thirteen colonies that became the thirteen original States. Consider the following highlights of American public trust history:

(1) As we demonstrated in our main brief (pp. 19-23), "little streams and rivers that are not a common passage for the king's people" were always considered subject to private ownership in common law England. Royal ownership was confined to those rivers, including those subject to the tide, that were "of common or publick use for carriage of boats and lighters." See, e.g., Lord Hale's treatise, *De Jure Maris,* reprinted in S.A. Moore, *A History of the Foreshore,* pt. 1 at 374 (1888); and see *Shively* v. *Bowlby*, 152 U.S. 1, 11-14 (1894).

That ownership distinction between navigable and non-navigable streams was never questioned by any of the colonial courts or those of the original thirteen States. None of the cases cited in the *amici* brief of the thirteen original States (pp. 7-23) is to the contrary, as we demonstrate in the appendix to this brief (*infra,* p. 1a) and as the Court demonstrated in its own case law survey in *Shively,* 152 U.S. at 14-26.

(2) Congress, in authorizing the formation of new territories and States, has always emphasized the navigability of the waters that must remain free common highways of commerce. Thus, as noted in *Shively,* 152 U.S. at 33, the Northwest Ordinance of 1787 decreed that "the navigable waters leading into the Mississippi and St. Lawrence . . . shall be common highways, and forever free [to the inhabitants and all citizens of the United States]". 1 Stat. 50. *Shively* also took special note of the congressional authorization for the formation of the State of Mississippi, which declared that "the river Mississippi, and the navigable rivers and waters leading into the same, or into the Gulf of Mexico, shall be common highways, and for ever free." Act of March 1, 1817, 3 Stat. 349. That statute is the best evidence we have of the general understanding of the public trust doctrine in 1817, when Mississippi entered the Union. The only public concern was in preserving the navigable streams as common highways of commerce. In the 1817 era, Congress expressed no concern whatever as to non-navigable waters that were tidally influenced; nor was there any reference to tidal ebb and flow as the measure of navigability.

(3) In *Propeller Genesee Chief* v. *Fitzhugh,* 53 U.S. (12 How.) 443, 454-455 (1851), the Court recognized that confusion had arisen from the English rule that seemed to equate public or navigable waters with tidewaters subject to ebb and flow. But the Court expressly rejected ebb and flow as the test of a navigable public stream, particularly for federal admiralty purposes in inland states with no tidally influenced navigable rivers. In so doing, the Court emphasized that it is the public or navigable character of the river that is crucial, not its tidal characteristic.

(4) That point was made even clearer in *Illinois Central Railroad* v. *Illinois,* 146 U.S. 387, 436 (1892). The Court there wrote: "So also, by the common law, the doctrine of

the dominion over and ownership by the crown of lands within the realm under tide waters is not founded upon the existence of the tide over the lands, but upon the fact that the waters are navigable, tide waters and navigable waters, as already said, being used as synonymous terms in England. . . . The doctrine is founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment."

(5) The seminal case in American public trust jurisprudence is *Shively* v. *Bowlby*, 152 U.S. 1, 49, 58 (1894). After a thorough survey of the public trust doctrine, the Court concluded that States receive in trust "the lands under navigable waters" for "the public purposes of navigation and fishery." While the *Shively* opinion frequently speaks of "lands under tide waters" as being within the public trust, it speaks only of those tide waters that are "of great value to the public for the purposes of commerce, navigation and fishery." 152 U.S. at 57. There is no indication that the Court considered "tide waters" to include non-navigable discrete streams that do not serve to define the inner reach of a navigable body of water.[7] See Part III of this reply brief.

(6) In *McGilvra* v. *Ross*, 215 U.S. 70, 78 (1909), the Court commented that the ebb and flow test "has had no place in American jurisprudence since the decision [in *Genesee Chief*], and is therefore no test of riparian ownership." But, as we have seen, ebb and flow has never by itself been a definition of public or navigable highways of commerce, the core of the public trust and equal footing

[7] As explained in *McGilvra* v. *Ross*, 215 U.S. 70, 79 (1909), "The *Shively* case was concerned with shore lands within the ebb and flow of the tide." *Shively* itself states that it concerns "the title in certain lands below high water mark in the [navigable] Columbia River in the State of Oregon." 152 U.S. at 9.

doctrines. *McGilvra* simply reiterates the historic doctrine that the public trust relates only to "the administration and disposition of the sovereign rights in navigable waters, and in the soil under them," as of the time a State enters the Union. 215 U.S. at 79.

McGilvra also emphatically states that *Shively*, which is a "tidewater" or "shore land" case, decided that the term "navigable waters" as there used "meant waters which were navigable in fact" and that such definition of navigability in a tidewater or shore land context "was not inadvertent or unnecessary." 215 U.S. at 78. See Part III of this reply brief, *infra*.

(7) It bears repetition that *Packer* v. *Bird*, 137 U.S. 661, 667 (1891), holds that the exclusion of private ownership rights in underwater soils is justified only to the extent that the waters are navigable or "susceptible of being used as highways of commerce in the ordinary modes of trade and travel on water." If the waters are of that nature, then "the proprietorship of the beds and shores . . . properly belongs to the States by their inherent sovereignty." *Barney* v. *Keokuk*, 94 U.S. 324, 338 (1876).

The conclusions to be drawn from the foregoing account are: (1) the public trust ownership of underwater soils has always been confined to soils under navigable waters, which by nature include the non-navigable shores and coasts thereof up to the mean high water mark; (2) public trust ownership has never been deemed to include soils under discrete non-navigable waters that are not susceptible or related to any public usage or concern. Thus the State of Mississippi did not acquire the soils under the discrete drainage streams and bayous here in question when it entered the Union in 1817.

III

Lands beneath discrete non-navigable drainage streams are not "tidelands" for public trust purposes.

Exploiting the fact that tides ebb and flow over the lands in question, the respondents and their supporting *amici* seek to transform this into a public trust "tidelands" case. They even restructure the single Question Presented to this Court to make it appear that the sole issue is whether, upon entering the Union, a State acquires title to "all tidelands within its boundaries."[8]

Such an effort is misplaced. It ignores the critical fact that these lands lie beneath discrete drainage streams that are not navigable or otherwise usable by the public. It ignores the long history of the public trust doctrine, a doctrine "founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment." *Illinois Central Railroad* v. *Illinois,* 146 U.S. 387, 436 (1892). It ignores the established proposition that shore lands and lands under tidewaters are components of the public trust doctrine only to the extent that they relate to "the public purposes of navigation

---

[8] In opposing certiorari, the respondent State of Mississippi repeated the exact same Question Presented that appears in the petition for writ of certiorari: "Whether, at the time of Mississippi's statehood in 1817, *the lands under the non-navigable but tidally influenced inland waters* were conveyed by the United States to Mississippi as part of the state-owned public trust." [Emphasis added]. Petitioners, but not the respondents and their *amici,* have accordingly addressed that question in their main brief before this Court.

The Question Presented in Mississippi's merits brief is this: "At the time Mississippi entered the Union in 1817, under the common law and on an equal footing with the original states, did the public trust lands conveyed by the United States to Mississippi include *all tidelands within its boundaries.*" [Emphasis added].

and fishery." *Hardin* v. *Jordan,* 140 U.S. 371, 381 (1891).

Petitioners have no quarrel with the proposition that "tidelands" may be a component of the public trust doctrine. But that proposition is not in issue in this case. The single Question Presented to this Court involves not tidelands but lands under discrete inland drainage streams that have none of the public or physical characteristics of tidelands. Most of the "tidelands" arguments in the four opposing briefs are thus irrelevant. See also the appendix hereto, *infra,* p. 1a, which analyzes the cases supporting those arguments.

"Tidewaters" and "tidelands" have played a somewhat confusing role in public trust jurisprudence. Originally, those terms reflected an erroneous American notion that the common law equated tidal ebb and flow rivers with public navigable rivers. That notion, along with the ebb and flow test of navigability, was roundly repudiated in *The Genesee Chief,* 53 U.S. (12 How.) at 455.

Later, but without precisely defining the terms, the Court began referring to sovereign dominion over "tidelands" and "tidewaters." *E.g., Shively* v. *Bowlby,* 152 U.S. at 49, 57. But such references appear only in situations where there is a clear public interest in, or usage of, the tidelands or tidewaters. If the lands or waters themselves are navigable, their public trust implications are obvious. If the lands or waters are non-navigable, their public trust character must derive from the navigable body of water to which they are in some way related.

In the latter context, the Court uses these terms to describe the inner reach of the shore or coast of a navigable body of water. In that situation, the tidal shoreline is endowed with a public trust interest by virtue of a public need to gain access to the more navigable or usable portions of the body of water. Thus in *Pollard's*

Lessee v. *Hagan,* 44 U.S. (3 How.) 212, 230 (1845), in volving lands over which tides ebbed and flowed, the Court imposed a public trust on the lands precisely because they constituted "shores of navigable waters." As such, the lands were useful to the public in facilitating an approach to the navigable Mobile River. See also *Baer* v. *Moran Brothers Co.,* 153 U.S. 287, 288-289 (1894) (public title to tidelands recognized because lands usable "in facilitating approach to the navigable waters from the upland"); *Massachusetts* v. *New York,* 271 U.S. 65, 92-93 (1926) ("seashore" belongs to public because it gives "access to the sea").

When this Court speaks of the public trust implications of "tidewaters" or "tidelands" it speaks of waters and lands that (1) are subject to the ebb and flow of the tide, and (2) form part of the coast or shore of, and are related to, some navigable body of water. *E.g., Shively* v. *Bowlby,* 152 U.S. 1 (1894) (tidewaters of the navigable Columbia River); *Knight* v. *U.S. Land Association,* 142 U.S. 161 (1891) (tidelands forming part of the shore line of San Francisco Bay); *Weber* v. *Board of State Harbor Commissioners,* 85 U.S. (18 Wall.) 57 (1873) (soil under the tidewaters of San Francisco Bay); *Mann* v. *Tacoma Land Co.,* 153 U.S. 273 (1894) (mudflats along the shore of a Puget Sound bay).[9]

---

[9] Some but not all the opposing briefs assert either that the *Mann* decision "speaks to the heart of the issue in the case at bar" (Miss.Br. 26) or that "[t]he *Mann* decision alone should be dispositive of this case" (Cal.Br. 13). Neither assertion is correct. The California brief quotes from the argument of counsel, not from the opinion of this Court, to the effect that the tidally flowed mudflats in question "were presumably by the unnavigable waters of some bay or inlet of the waters of Puget Sound" (153 U.S. at 278). But the opposing counsel in *Mann* seemingly argued that the mudflats were located "upon the shores of navigable waters" (38 L.Ed at 717), which seems likely since this was a "wharfing out" case.

The Court's treatment of tidelands is consistent with the geophysical definition of the term. Shalowitz, the leading authority on tidelands and seashores, defines "tidelands" as land, covered and uncovered by the tide, that lies in "the zone between the mean high-water line and the mean low-water line along a coast, and is commonly known as the 'shore' or 'beach.' " Justice Blackmun's dissent in *Kaiser Aetna* v. *United States,* 444 U.S. 164, 183 (1979), defines a tidal shoreline in a slightly different manner: "The ebb and flow of the tide defines the geographical, chemical, and environmental limits of the three oceans and the Gulf that wash our shores. Since those bodies of water in the main are navigable, they should be treated as navigable to the inner reach of their natural limits."

As thus put in their proper coast or shore context, tidal water and the underlying soils may embody certain other characteristics that may superficially seem inconsistent with imposing public trust status on them in the name of navigability. First, tidewaters themselves are often non-

---

The *Mann* Court did not resolve this factual dispute, treating the mudflats as tidelands overflowed by the waters of a Puget Sound bay. But *Mann* must be read in conjunction with a companion decision that follows the *Mann* ruling, *Baer* v. *Moran Brothers Co.*, 153 U.S. 287 (1894). In *Baer* the Court treated very similar tidally flowed mudflats "as a part of the shore or tide lands" that were described as "adjacent to the waters of Puget Sound." The Court concluded that the mudflats in issue were strictly within the definition of "tidelands" since they "may be used in facilitating approach to the navigable waters from the upland." 153 U.S. at 288-289.

[10] A.L. Shalowitz, Shore and Sea Boundaries, Vol. 1, appendix, p. 318 (1962). Mr. Shalowitz was formerly special assistant to the Director, United States Coast and Geodetic Survey, Department of Commerce. See also L.A. Teclaff, Water Law in Historical Perspective, 293 (1985).

navigable. But that only reflects the physical fact that all navigable waters tend to have non-navigable shores, coasts, beaches, or boundaries. Second, non-navigable tidelands are usually subject to the ebb and flow of the tide. That means only that the inner boundary of the navigable body of water is to be measured by the mean high water mark on the tidal shoreline.

In sum, public trust dominion over navigable waters extends inward to the mean high water mark of their banks or coasts, much of which, when separately considered, may be non-navigable. That does not mean, of course, that every drainage ditch or stream in which the tide ebbs and flows, nor every small creek in which a fishing skiff or gunning canoe or "toothpick under sail" can float at high water, is a navigable highway or marks the inner boundary of the nearest navigable body of water. See *The Montello,* 87 U.S. (20 Wall.) 430, 442 (1874).

The opposing briefs grieviously err in assuming that a tidal influence on discrete inland drainage streams transforms the underlying soils into part of the shores washed by the Jourdan River or any other navigable body of water. Those soils and those streams certainly do not define the geographic, chemical or environmental limits of any navigable water. Nor are such soils and streams susceptible to any kind of public navigation or other usage and enjoyment. They do not facilitate access to any river, bay or Gulf.

The respondents leave unanswered the following questions: What interest or use does the public have in the discrete little drainage streams here at issue?[11] How can

---

[11] It is enough, then, that the underwater lands in question are not navigable in fact and do not form any meaningful part of a navigable body of water. See *Toledo Liberal Shooting Co.* v. *Erie Shooting Club,* 96 Fed. 680 (C.C.A. 6, 1898) (shallow marshy creek opening in-

private ownership of the underwater lands encroach upon or interfere with any public use or enjoyment of such non-navigable streams? How can private ownership burden public access to any navigable body of water? What is the navigable body of water whose natural limit or inner reach is measurable by the mean high tidal mark on these little tributaries? Are we to meander the shoreline of some navigable body, such as the Jourdan River or the Gulf of Mexico, as far up its tributaries as the tide will carry a toothpick under sail? Cf. *Knight v. U.S. Land Association,* 142 U.S. 161 (1891).

Respondents' reliance on the outmoded ebb and flow test provides no satisfactory answers to those questions. Tidal influence alone does not suffice as a reason for applying the public trust doctrine. As the Court observed in *Illinois Central,* 146 U.S. at 426, the doctrine with respect to lands under tidewaters

> . . . is not founded upon the existence of the tide over the lands, but upon the fact that the waters are navigable. . . . The doctrine is founded on the necessity of preserving to the public the use of navigable waters from private intereference and encroachment, a reason as applicable to navigable fresh waters as to waters moved by the tide.

Finally, this Court long ago disposed of the contention of the thirteen original States (13 Br. 27-29) that each new State, upon entering the Union, has sovereign authority to define both the nature and the physical extent of

---

to Lake Erie, a creek incapable of sustaining commerce or any other public use, held to be private property); *United States* v. *Oregon,* 295 U.S. 1, 16-24 (1935) (non-navigable swamp waters held not to be part of public trust dominion). Cf. *United States* v. *Turner,* 175 F.2d 644, 647 (5th Cir. 1949), *cert. denied,* 338 U.S. 851 (1949).

sovereignty over trust shorelands, at least to the extent that the original thirteen States had that authority. The nature and the extent of sovereign title acquired upon a State's entry into the Union are the very essence of the federal question here at stake. The constitutional principle of the equality of the States, known as the equal footing doctrine, demands that these public trust matters be determined by a uniform federal rule, rather than turning on varying local rules that "would give the Constitution a diversified operation where uniformity was intended." *United States* v. *Holt State Bank,* 270 U.S. 49, 567 (1926); and see *United States* v. *Utah,* 283 U.S. 64, 75 (1931); *Brewer-Elliott Oil & Gas Co.* v. *United States,* 260 U.S. 77, 87-88 (1922).

[12] *Cf. Wisconsin* v. *Trudeau,* 139 Wis.2d 91 (1987), presently pending before this Court on petition for certiorari. The first question presented in that petition is: "Can the State of Wisconsin take title to non-navigable wetlands under the public trust doctrine simply because the wetlands drain into water courses that, in turn, drain into a navigable lake?"

CONCLUSION

For the foregoing reasons, supplementing those in petitioners' main brief, the judgment of the Mississippi Supreme Court should be reversed and the case remanded for further appropriate proceedings.

Respectfully submitted,

EUGENE GRESSMAN
1111 Raymond Boulevard
Newark, N.J. 07102
(201) 642-8844
Counsel of Record

JOEL BLASS
Mize, Thompson & Blass
Gulf National Bank Bldg.
Gulfport, Miss. 39502
(601) 863-2612

WILLIAM G. PAUL
General Counsel
JOHN L. WILLIFORD
ELIZABETH A. HARRIS
Legal Division, Phillips
Petroleum Company
1252 Adams Building
Bartlesville, Okla. 74004
(918) 661-6280

Counsel for Petitioners

In The

Supreme Court of the United States

October Term, 1987

No. 86-870

PHILLIPS PETROLEUM COMPANY and
CINQUE BAMBINI PARTNERSHIP,
Petitioners,

v.

STATE OF MISSISSIPPI and
SAGA PETROLEUM, U.S., INC.,
Respondents.

On Writ of Certiorari to the Supreme Court of Mississippi

REPLY BRIEF APPENDIX

The *amici* brief of the thirteen original States presents a review or summary of the "original State laws and decisions . . . with an eye towards establishing what shorelands they reserved at the time the Constitution was adopted." 13 Br. 5-6. This appendix analyzes that state-by-state summary (13 Br. 6-24) with an eye towards demonstrating that none of the early State decisions or laws cited in that summary dealt with the problem in this case – i.e., the public trust ownership of discrete non-navigable inland streams that, while tidally influenced, reflect no public usage or interest. All the cases and laws cited in that *amici* brief involve either navigable waters or the non-navigable shorelands of navigable bodies of water – geophysical factors not here involved.

Cases and laws cited in amici brief	Petitioners' comments
MASSACHUSETTS	
1. *Commonwealth* v. *Charlestown*, 18 Mass. (1 Pick.) 180, 182 (1822), cited for proposition that the Massachusetts Bay Colony, prior to a 1641 ordinance, abided by the English common law of shorelands to the effect that "all arms of seas, coves, creeks, etc., where the tide ebbs and flows, are the property of the sovereign." 13 Br. 6.	1. *Charlestown* actually stated that, while by the common law the sovereign's title extended to all places where the tide ebbs and flows, whether such places are navigable or not, "it is probable the usages of our country have given a reasonable limitation to this doctrine, confining the public right to what may be of public use; so that in many little creeks into which the salt water flows, but which are incapable of being navigated at all, private property may be maintained. This is undoubtedly the case with many of the creeks which run through our extensive marshes . . ." 18 Mass. at 186.
2. The 1641 ordinance "granted to adjacent upland owners title to the shore down to the mean low tide mark or one hundred rods . . . from the mean high tide mark, whichever was less. . . . Public rights to fishing, fowling, and navigation in the intertidal zone were, however, reserved from the grant. *Commonwealth* v. *Alger*, 61 Mass. (7 Cush.) 53, 67-68 (1851)." 13 Br. 6.	2. The *Alger* case does not address ownership; it only concerns public use. The public use of shorelands is irrelevant to the issue of who owns the non-navigable discrete inland waters that are tidally influenced.

3. "The Commonwealth's dominion over the public rights in tidal waters is not dependent on whether the waters are navigable-in-fact. See *Commonwealth* v. *Vincent*, 108 Mass. 441, 447 (1874)." 13 Br. 7.	3. The *Vincent* case stated only that the Commonwealth has power to regulate fishing rights both in tidewaters and in non-tidal "great ponds." It does not otherwise discuss property ownership or dominion. See 108 Mass. at 447. In *Rowe* v. *Granite Bridge Corp.*, 38 Mass. (21 Pick.) 344 (1838) – a case not cited by the *amici* brief – Chief Justice Shaw wrote that "It is not every ditch, in which the salt water ebbs and flows, through the extensive salt marshes along the coast, and which serve to admit and drain off the salt water from the marshes, which can be considered a navigable stream. Nor is it every small creek, in which a fishing skiff or gunning canoe can be made to float, at high water, which is deemed navigable. But in order to have this character, it must be navigable to some purpose, useful to trade or agriculture." 38 Mass. at 347. [Quoted by this Court in *The Montello*, 87 U.S. (20 Wall.) 430, 442 (1874)].

NEW HAMPSHIRE

4. "In New Hampshire, '[i]t is well established law' that 'tide waters are public waters. As such they are within the power of the Legislature to make such laws as the public good may require.' *Sibson* v. *State*, 110 N.H. 8, 10, 259 A.2d 397, 399 (1969)." 13 Br. 7.	4. *Sibson* concerns the State's right to regulate the use of privately owned marshland. It does not consider the question of ownership, other than conceding the private ownership of the marshland at issue.
5. "While navigability-in-fact is the appropriate test to determine whether freshwater lakes and streams are public waters, since New Hampshire's earliest days the action of the tide has furnished 'a convenient means of locating the boundary of the largest reservoir of public water.' *Concord Manufacturing Co.* v. *Robertson*, 66 N.H. 1 at 5, 25 A. 718 at 723 (1889)." 13 Br. 7-8.	5. The *Robertson* case holds that "navigable water" means "all such waters as are actually navigable, whether fresh or salt." 66 N.H. at 10, 25 A. at 728. Although New Hampshire courts have never addressed the ownership of non-navigable waters, a consistent application of New Hampshire's navigability test of public waters would lead to private ownership of non-navigable waters, however tidally flowed.

RHODE ISLAND

6. "Rhode Island case law consistently establishes that title to shorelands below the high water mark, and subject to the ebb and flow of the tide, lies in the State. 'In this state, at common law, the fee of the soil in tide waters below high water-mark is in the state.' *Bailey* v. *Burges*, 11 R.I. 330, 331 (1876); [additional citations omitted]." 13 Br. 9.	6. But Rhode Island case law is silent on the subject of ownership of non-navigable waters subject to tidal influence. The reference to the *Bailey* case in 13 Br. in terms of "shorelands" and "tide waters" reflects the *amici* confusion of those terms with discrete non-navigable waters. *Bailey* and the other cited cases all concern navigable waters.

(1876); [additional citations omitted]." 13 Br. 9.

the other cited cases all concern navigable waters.

7. "'The public rights secured by this trust are the rights of passage, of navigation and fishery, and these rights extend . . . to all land below high water unless it has been so used, built upon or occupied, as to prevent the passage of boats, and the natural *ebb and flow of the tide.*' (Emphasis added). *Allen* v. *Allen*, 19 R.I. at 116; *Jackvony* v. *Powel*, 67 R.I. at 226." 13 Br. 9.

7. The *Allen* case involved a trespass on lands between high and low tide bordering a navigable body of water, while *Powel* concerned the public's right to use the sea shore. Neither case decided ownership. They were limited to consideration of the public use of concededly public lands.

8. "The fact that waters adjacent to the shoreland are or are not navigable has never been a requisite criteria for determining what tidelands of Rhode Island are held by the State in trust." 13 Br. 10.

8. But "waters adjacent to the shoreland" are not in issue in the instant case. Shores of navigable waters are usually state-owned and obviously cease to be navigable-in-fact in the shallow shore waters.

No case cited in 13 Br. indicates that Rhode Island has ever laid title claim to discrete non-navigable little streams that are tidally influenced

CONNECTICUT

9. 'The title of the king, *prima facie*, to all ports and arms of the sea to high water mark, and to the soil thereof, has long been established law; and . . . it is settled, that he may grant the property of the soil be-

9. In *East Haven*, the court simply ruled that the Crown could grant title to navigable waters. The case concerned a navigable river, and did not purport to decide whether discrete non-navigable but tidally in-

tween high and low water mark to a subject or corporation.' *East Haven* v. *Hemingway*, 7 Conn. 186, 198 (1828)." 13 Br. 10.

fluenced waters could be publicly owned.

10. "Adoption of the English common law regarding public ownership of all lands below 'high water mark' has been continually reaffirmed in Connecticut case law. 'The doctrine of the common law is, that the right to the soil of proprietors of land on navigable rivers extends only to high water mark; all below is *publici juris* – in the king, in England. That is the law in Connecticut; for we have no statute abrogating it.' *Chapman* v. *Kimball*, 9 Day 38, 40 (1831)." 13 Br. 10.

10. *Chapman* also declared (9 Day at 40-41): "A distinction is always maintained between rivers navigable and those not navigable. – Of the former the public alone has right; – of the latter, individuals may, and generally do own the same right as over other real estate."

11. "Within the context of colonial times, navigable waters as discussed in Connecticut case law referred to tidal influence rather than navigability-in-fact," citing *Adams* v. *Pease*, 2 Conn. 481, 484 (1818).

11. The *Adams* case held that the riparian owner of a navigable river not tidally influenced has the exclusive right of fishing. The court's equating of navigability with tidal influence cannot be construed as deciding ownership of non-navigable ebb and flow waters – an issue not before the *Adams* court.

NEW YORK

12. "As early as 1829 an appellate court of New York held that the navigable rivers and arms of the sea where the tide regularly ebbs and flows belong to the people. *Lansing* v. *Smith*, 4 Wend. 9 (1829)." 13 Br. 12.

12. *Lansing* concerned the rights of a riparian owner as the grantee of land between the high and low tide on the Hudson River. The case did not consider, nor decide, the rights of riparian owners to land under non-navigable tidal waters.

13. "It is also well established in New York 'that a conveyance by a governmental agency of land fronting on a navigable body of water conveys title only to the high water line.' *Dolphin Lane Association* v. *Town of Southampton*, 72 Misc. 2d 868, 882, 339 N.Y.S. 2d 966, 981 (1971)." 13 Br. 12.

13. The *Dolphin Lane* case concerned title to the tidally influenced Shinnecock Bay. Title thereto was determined on the basis of actual navigability rather than on tidal influence. The court said:

"The defendants proved that the Shinnecock Bay was tidal in 1818 and thus would meet the definition of navigability which was in use *prior to the Revolution* . . . This pre-revolutionary criteria for determining navigability evidently was not followed by the Courts of this State as indicated by . . . *Roberts* v. *Baumgarten*, 110 N.Y. 380 at page 1383, 18 N.E. 86 at page 97 . . . .

"The defendants also proved that Shinnecock Bay was 'navigable in fact,' and thus met the present criteria followed by our Courts to determine the navigability of a body of water." (citations omitted; emphasis ad-

ded). 339 N.Y.S. 2d at 980-981.

Thus navigability-in-fact is the "present criteria" for determining title in New York.

14. "'The foreshore, or land under the waters of the sea and its arms, between high and low-water mark, is subject, *first*, to the *ius publicum* — the right of navigation, . . .' *Tiffany* v. *Town of Oyster bay*, 234 N.Y. 15, 20, 136 N.E. 224, 225 (1922)." 13 Br. 12.

14. *Tiffany* involved a title dispute to lands below high tide on Oyster Bay that had been unlawfully filled by the riparian owner. The law of the "foreshore" has little or no bearing on the issue in the instant case.

15. "The authority of the State of New York to convey land under the tide waters is accordingly limited. 'The title of the state to the seacoast and the shores of tidal rivers is different from the fee simple which an individual holds to an estate in lands. It is not a proprietary, but a sovereign right, and it has frequently been said that a trust is engrafted upon this title for the benefit of the public of which the state is powerless to divest itself.' *Coxe* v. *State*, 144 N.Y. 3965, 405-406, 39 N.E. 400, 402 (1895)." 13 Br. 12-13.

15. *Coxe* referred only to state title to the seacoast and the shores of tidal navigable rivers. *Coxe* has no relevance to the question in the instant case, i.e., whether the state acquires public trust title to a discrete non-navigable stream that forms no shore or coast of a navigable body of water.

NEW JERSEY

16. "Between 1804 and 1851, there were numerous conveyances by the Legislature

16. This statement proves nothing. The fact that the tidelands conveyed were not

of State tidal lands. In each instance the lands conveyed were described either originally, or at the time, as being 'under water.' In no case were the lands described as 'navigable.' " 13 Br. 14.

denominated "navigable" does not prove that the State was claiming those that were non-navigable.

17. "An early assertion of ownership of the State of New Jersey to the beds of non-navigable waters led to the decision of this Court in *Martin* v. *Lessee of Waddell*, 41 U.S. 367 (1842). The introduction to *Martin* notes that the jury 'found the premises in dispute are situated beneath the waters of the Raritan River and Bay, where the tide ebbs and flows,' without any reference to its navigability. *Martin* v. *Waddell*, 41 U.S.at 368." 13 Br. 15.

17. The brief of the thirteen original States (13 Br. 15) errs in referring to a jury finding in *Martin* that the land in question lay beneath the Raritan River and Bay, where the tide ebbs and flows, "without any reference to its navigability." There is no such finding in the so-called "introduction" at page 368; the headnotes on that page make numerous references to "navigable waters." More importantly, Chief Justice Taney's opinion for the Court states that the jury found "that the land claimed lies beneath the navigable waters of the Raritan river and bay, where the tide ebbs and flows." 41 U.S. at 407.

Moreover, *Martin* v. *Waddell* was not the culmination of an "early assertion of ownership of the State of New Jersey to the beds of non-navigable waters." As Chief Justice Taney remarked, "it appears that the principal matter in dispute, is the right to the

oyster fishery in the public rivers and bays of East Jersey" – rivers and bays navigable in character. 41 U.S. at 407. In that navigability context, the *Martin* opinion stated that the people of each State "hold the absolute right to all their navigable waters and the soils under them for their own common use." *Id.*, at 410.

Thus *Martin* v. *Waddell* did not have occasion to consider whether New Jersey held any sovereign title to its non-navigable tidal streams.

18. Quoting from *Cobb* v. *Davenport*, 32 N.J.L. 369, 378 (Sup.Ct. 1867), and *Attorney General* v. *Delaware & Bound Brook R.R.Co.*, 27 N.J.Eq. 631, 639 (E. & A 1876), the *amici* brief of the thirteen original States concludes its New Jersey analysis by asserting that "there was a consistent assertion of title by the State to the shorelands subject to the ebb and flow of the tide from the earliest times." 13 Br. 16.

18. Neither of the cited cases purports to decide or discuss whether the ebb and flow test would confer on the State sovereign title to lands under non-navigable discrete streams subject to tidal influence. The cases merely affirmed that New Jersey made and had no claim to its non-tidal freshwaters.

See also *Ross* v. *Mayor of Edgewater*, 115 N.J.L. 477, 483 (Sup.Ct. 1935), holding that "While a boundary on a non-navigable stream extends *ad medium filum aquae*, in the case of bays, arms of the sea, and navigable rivers, it reaches only to the shore or ordinary high water mark." To the same effect for an

earlier period of time, see *Bell* v. *Gough*, 23 N.J.L. 624, 662 (1852).

That New Jersey may have asserted title to shorelands subject to tidal ebb and flow is quite irrelevant to the issue in the instant case, which involves not shorelands but discrete non-navigable drainage streams.

PENNSYLVANIA

19. The *amici* brief cites only *Ball* v. *Slack*, 2 Whart 508, 539 (Pa. 1837), to the effect that the State owns lands between the low and high tide marks of the ocean "and wherever the tide ebbs and flows," that being "part of the common highway . . ." 13 Br. 16-17.

19. *Ball* deals with wharfing out into the navigable waters of the Delaware River. It says nothing about title to discrete non-navigable drainage streams.

Moreover, in referring to the *Ball* statement about tidal waters being "part of the common highway," the *amici* brief omits the words immediately following "the common highway" – i.e., "the common highway, over which all citizens and aliens may sail." 2 Whart at 539. Such a reference can only be to a common highway over a navigable body of water. A non-navigable stream cannot provide such a common highway.

DELAWARE

20. The *amici* brief quotes the following from *Bickel et al. v. Polk*, 5 Del. (Harr.) 325, 326 (1851): "In all navigable waters, where the tide ebbs and flows, the people have of common right the privilege of fishing, and of navigation, between high and low water mark, though it be over private soil." 13 Br. 17.	20. It cannot be assumed that the reference in *Bickel* to "navigable waters" includes "non-navigable waters." Further, the right to fish says nothing of ownership of the underlying soil. *Bickel* stated that the right of fishing "in all public streams" where the tide ebbs and flows is also a common right. 5 Del. at 326. That language, if relevant at all, suggests that, if only public navigable streams are subject to public rights of fishing, it is unlikely that non-navigable waters would be other than privately owned.
21. "It has also been stated that the tidelands in Delaware, which are subject to the public's trust rights, is not 'limited to that appurtenant to an ocean. On the contrary, foreshore can be found along any tidal water.' *Phillips v. State, Ex Rel. Department of Natural Resources*, 449 A.2d 250, 255 (1982) . . ." 13 Br. 17.	21. The quotation from the *Phillips* case is inaccurate. The subject of the quoted matter is not "tidelands" but "foreshore," thus making the sentence read: "it cannot be said that foreshore is limited to that appurtenant to an ocean." 449 A.2d at 255. The *Phillips* statement was meant to establish that foreshore may be found along a bay, as well as an ocean. Thus it is quite irrelevant to the question in the instant case.

MARYLAND

22. "After the Revolution, the tidelands were held by the State for the benefit of the public by virtue of Article 5 of the Declaration of Rights in the Maryland Constitution. *Board of Public Works* v. *Larmar Corp.*, 262 Md. 24, 277 A.2d 427 (1927) . . . (additional citations omitted)." 13 Br. 18.

22. Neither the *Larmar* case nor any of the other cited cases concerns ownership of lands under non-navigable tidally influenced waters. Indeed, that issue has never been decided by a Maryland court. And since the discrete streams in the instant case are not true "tidelands" in the public trust sense, what claim Maryland may have made to her tidelands "after the Revolution" is beside the point.

VIRGINIA

23. "In Virginia, the law at the time of adoption of the Constitution was a codification of the English common law, the Act of May 1780 . . . This Act reserved '[A]ll unappropriated lands on the Bay of the Chesapeake, or the sea shore, or the shores of any river or creek' for use 'as a common to all of the good people' of the Commonwealth. *Garrison* v. *Hull & als.*, 75 Va. 150, 160 (1881)." 13 Br. 19.

23. In a passage omitted from the *amici* brief, the 1780 statute declared that "all unappropriated lands . . . *which have remained ungranted by the former government, and which have been used* as a common to all of the good people" are excepted from the statute's provision for the granting of land (omitted passage italicized).

The *Garrison* court understood this statute to preserve the fishing rights of the people by reserving to the public only those waters 1) not already privately owned, and 2) used by the

public. The statute did not adopt a tidal test of public ownership. It merely declared that waters already owned by the public would stay that way. Also, the statute concerned public waters alone, and not private, non-navigable waters. It did not seek to reserve for the public those streams whose use by the public was miniscule if not non-existent.

24. "A Virginia Legislature Act of 1819 extended to the low waster mark the seaward boundary of an upland owner's property, if the grant was made prior to 1780. However, even though title was in the upland owner, the shoreland remained subject to the public's right to fish, fowl and hunt. See *Bradford* v. *Nature Conservancy*, 224 Va. 181 (1982)." 13 Br. 19.

24. The 1819 statute cited in *Bradford* in no way reserved to the State any lands by virtue of the ebb and flow test. Rather, it applied very specifically to "the Atlantic Ocean, the Chesapeake bay, and the rivers and creeks thereof." 224 Va. at 196. It did not address the question of navigability or whether non-navigable creeks were to be included.

Indeed, Virginia has never applied the ebb and flow test. The State has never claimed waters or underwater lands not already in public use.

NORTH CAROLINA

25. "In the seminal case of *State* v. *Glen*, 52 N.C. (7 Jones) 321 (1859), the court reviewed its prior decisions and reaffirmed the primary classes of waters which con-

25. The "seminal case" of *State* v. *Glen* actually says quite the opposite. It states: "In England, navigable waters which are *publici juris*, and as such distinguishable from

tinue to be recognized: public trust beds and private beds. The *Glen* court recognized that public trust ownership of the bed extends both to all lands subject to the ebb and flow of the tides to the farthest influx of salt water, *Collins* v. *Benbury*, 25 N.C. (3 Ired.) 277 (1842), and to all waters navigable by "sea vessels' as defined in *Wilson* v. *Forbes*, *supra*." 13 Br. 20.

those we have been describing, are ascertained by the ebb and flow of the tide. This criterion has been held by our courts not to be applicable to the watercourses of North Carolina, and has been long since repudiated. We hold that any waters, whether sounds, bays, rivers, or creeks, which are wide enough and deep enough for the navigation of sea vessels, are navigable waters, the soil under which is . . . common to all the citizens of the State. *Wilson* v. *Forbes*, 13 N.C. 30; *Collins* v. *Benbury*, 25 N.C. 277; *Fagan* v. *Armstead*, 33 N.C. 438, and *S.* v. *Dibble*, 49 N.C. 107. In streams not navigable the bed of the river may be, under the general entry law, the subject of a grant to a private individual, and the riparian proprietor will be without an express grant of the bed of the stream, entitled to the propriety of the soil." *Id.*, 52 N.C. at 251.

Collins v. *Benbury*, *supra*, held that Albemarle Sound was a navigable water, "whether there was any tide or not in the Sound." *Id.*, at 197. The court also held that legislative references to navigable waters must refer to "the actual state of our own streams, rivers and

sounds, rather than in the sense of the common law, which would render them inapplicable to our condition." *Id.*

The North Carolina cases extend public ownership to non-tidal rivers that are navigable in fact, using the term "navigable waters" to mean actual navigability. The ebb and flow test is nowhere used as the definition of "navigable waters." Nor has the State claimed any non-navigable tidally influenced streams, which are deemed subject to private ownership.

SOUTH CAROLINA

26. "In South Carolina, in accordance with the common law, the title to land under tide waters was in the State, and a grant of land bounded by such waters passed no title below high water mark. Thus, in 1884, the South Carolina Supreme Court . . . ruled that title to several hundred acres of salt water marshland 'below the line of high water-mark, and subject to the daily ebb and flow of the tides' was held by the State. *State* v. *Pinckney*, 22 S.C.Rep. 483, 508 (1884)." 13 Br. 21.

The brief concludes that "at the time of statehood . . . South Carolina applied the com-

25. The South Carolina courts, like those of the other original States, were never called upon to consider the ownership of non-navigable discrete streams that are tidally influenced. The *Pinckney* case, like so many others, involved the rights of riparian owners to the shorelands of large navigable tidal rivers. It is futile to seek in such cases any evidence of a state claim to lands such as are at issue in the instant case.

mon law to its shorelands, that is, those lands below the line of high water-mark, and subject to the daily ebb and flow of the tides, were held by the State." *Id.*

GEORGIA

27. The *amici* brief cites *Johnson* v. *State*, 114 Ga. 790, 791, 40 S.E. 807, 808 (1901), for the following proposition (13 Br. 22):

"While the first Georgia Code adopted in 1863 expanded the concept of State-owned waters to include those freshwater rivers which are navigable-in-fact, the Georgia Supreme Court concluded that the Georgia statute which accorded to the adjacent landowner title to the bed of non-navigable streams did not apply to tidewaters. Lands subject to the ebb and flow of the tide, even if not navigable-in-fact, remained publicly-owned tidelands."

27. The *Johnson* case involved a criminal charge of taking oysters from lands between high and low water of a tidal bay. In its opinion, the Georgia court wrote: "the sole test to be applied in determining whether or not a stream is navigable is its capacity to bear upon its bosom boats loaded with freight, and that the question whether or not the tide ebbs and flows in any part of the stream should not be considered." *Id.*, 114 Ga. at 791, 40 S.E. at 808.

28. "In a dispute over oyster rights in a stream subject to the ebb and flow of the tide and not navigable-in-fact, the Supreme Court of Georgia held that the non-navigable streams and adjacent marshes were public lands subject to a public oyster lease. *Oemler* v.

28. The *Oemler* court was called upon to construe a grant from King George II. It held that "so far from conveying the marshes, the marshes are used to limit the island. They are the point beyond which the island is not to go." *Id.* The court specifically refrained

Green, 134 Ga. 198, 67 S.E. 433 (1910)." 13 Br. 22.

from reviewing its decision in *Johnson* v. *State*, *supra*. Thus the *Oemler* ruling was based not on any theory of navigable waters but on a simple construction of a royal grant.

29. "While there have been specific grants of title and other rights in lands covered by tidewaters, such private ownership remains subject to the public trust rights of navigation, transportation and public passage, regardless of navigability-in-fact of the adjacent waters. Ga. Laws, 1902, p. 108; Ga.Code Ann. sec. 44-8-8 (1982). In addition, the public has the right to fish in all waters subject to the ebb and flow of the tide, whether navigable or non-navigable. *West* v. *Baumgartner*, 124 Ga.App. 318, 184 S.E. 2d 533 (1971), reversed on other grounds, 228 Ga. 671 (1972)." 13 Br. 22-23.

29. The cited 1902 statute expressly recognized that title to the beds of all non-navigable tidelands, where the tide ebbs and flows, "shall vest in the present owner of the adjacent land for all purposes." Georgia has thus limited its title claims to navigable-in-fact tidewaters. See *West* v. *Baumgartner*, 124 Ga.App. 318, 324, 184 S.E. 2d 213, 219-220 (1971).

CONCLUSION

The brief of the thirteen original States concludes its survey with these words: "It is clear that each and every one of the thirteen original States made clear and definitive claims of ownership, or control, over the lands subject to the ebb and flow of the tide, without regard to

the navigability of the adjacent water, at the time the Constitution was adopted." 13 Br. 23.

Petitioners suggest that this survey proves quite the opposite. There appears to be no clear precedent, at the time the Constitution was adopted, indicating that any of the original thirteen States made any claim of sovereign title over discrete non-navigable drainage streams of the type involved in the instant case.